No. 79-788

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOSEPH DIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 605 F. 2d 1307.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1979. A petition for rehearing was denied on October 23, 1979 (Pet. App. 44a-45a). The petition for a writ of certiorari was filed on November 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a 39-day delay in judicially sealing the recordings of court-authorized wire interceptions of petitioners' conversations was satisfactorily explained.

STATUTES INVOLVED

18 U.S.C. 2518(8)(a) provides:

> The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

18 U.S.C. 2518(10)(a) provides in pertinent part:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> * * * * *

STATEMENT

Following a jury trial before the United States District Court for the District of South Carolina, petitioners were convicted of conspiring to transport and distribute in interstate commerce stolen automobile engines and parts, in violation of 18 U.S.C. 371.[1] Petitioners Diana, Robertson, Jones, Stabile, Pellegrino, Burnham, and Volino were sentenced to five years' imprisonment; petitioners Huey and White to four years' imprisonment; and petitioners Jenkins, Catoe, and Melton to three years' imprisonment. The court of appeals affirmed (Pet. App. 1a-26a).

1. In proving its case, the government relied on evidence obtained through court-authorized electronic surveillance of conversations conducted between March 22 and April 11, 1977. FBI agents conducting the surveillance set up five machines, each of which made

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[1]The indictment charged 25 defendants with one count of conspiracy and numerous substantive offenses in violation of 18 U.S.C. 2314 and 2315. All substantive counts were dismissed before the case went to the jury, as were the conspiracy charges against three defendants. The jury acquitted 10 of the remaining 22 defendants (Pet. App. 2a).

two simultaneous recordings. One recording was treated as the original recording, and the other as a duplicate original (A. 172, 176-177, 188-189, 192).[2] At the end of each day of surveillance, the FBI agent in charge placed the original tapes in envelopes, sealed, initialed and dated the envelopes, and placed them in a locked cabinet in an apartment where the monitoring took place (A. 177-178, 191, 221, 226-228). One agent was assigned custody of the tapes and had sole access to the original tapes (A. 178, 181, 225).

Upon the termination of the surveillance on April 11, the original and duplicate original tapes were transported from Lancaster, South Carolina, to the FBI office in Rock Hill, South Carolina, where they were placed in a locked cabinet (A. 198-199, 229). On April 13, the United States Attorney instructed the agent in charge of the tapes to place the originals in sealed boxes and to keep them in the FBI office until further notice (A. 237-240). On May 20, pursuant to an order of the district court,[3] the tapes were delivered to the United States Marshal in Columbia, South Carolina, for formal sealing (A. 229-230, 237, 242, 245, 247).

2. Prior to trial petitioners moved to suppress the electronic surveillance evidence on the ground, *inter alia*, that the tapes had not been judicially sealed immediately after the termination of the surveillance, as required by

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[2]"A." refers to the appendix filed by petitioners in the court of appeals.

[3]The district judge gave an oral sealing order to the United States Attorney sometime between April 11 and May 20. However, neither the court nor the United States Attorney kept any written record of the order or of the date on which the order was given. The order directed that the tapes be delivered to the United States Marshal for formal sealing (A. 274, 295-297, 301, 304-305, 333-336).

18 U.S.C. 2518(8)(a). The district court denied petitioners' motion (Pet. App. 27a-43a), finding that the government had given a reasonable explanation for any delay in the judicial sealing of the tapes. From the time the surveillance terminated on April 11, until the time the tapes were delivered to the Marshal's office on May 20, the duplicate tapes were used to prepare warrants, an indictment, and a transcript of the tapes. Pursuant to discussions with the United States Attorney, the FBI agents retained the original tapes to facilitate reference to them if the duplicate tapes malfunctioned (A. 194-197, 206).[4] Since duplicate tapes had malfunctioned in the past (A. 211-212) there was reason to fear that a malfunction might happen again.

The court further found that there had been substantial compliance with the statute, warranting the use of the tapes at petitioners' trial. The tapes were sealed in envelopes the day they were made, and sealed in boxes as soon as the surveillance terminated; no seal had been broken prior to the pretrial proceedings. It was accordingly evident that the integrity of the tapes had been preserved and that no tampering of any kind had occurred. Thus, the purpose of the statute's immediate sealing provision, which was to insure the integrity of the tapes, had been fulfilled (Pet. App. 36a-37a).

3. The court of appeals affirmed, holding that the district court's finding of a satisfactory explanation for the delay was not clearly erroneous (Pet. App. 16a). The court further found that other factors supported a decision to admit the evidence, including the relatively

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[4]The FBI office was located in Rock Hill, approximately 80 miles from the Marshal's office in Columbia (A. 216).

brief nature of the delay as compared to the delay in cases in which suppression had been held to be warranted, the extra precautions and protective measures taken with regard to the tapes at the end of each day of recording, the uncontroverted evidence as to the integrity of the tapes, and the fact that the government did not delay the sealing in order to obtain any tactical advantage (Pet. App. 17a-19a).

Judge Hall dissented (Pet. App. 20a-26a). In his view, the fact that the integrity of the tapes had been preserved, and the purpose of the immediate sealing requirement accomplished, was irrelevant. Rather, the sole exception to the statute's immediate sealing requirement was a satisfactory explanation for the government's delay in sealing the tapes. In his view the government's explanation for the delay was unsatisfactory and the statute thus required that the tapes be suppressed.

ARGUMENT

Petitioners claim (Pet. 12-13) that the court of appeals erred in holding that the government established a satisfactory explanation for the 39-day delay in sealing the tapes.[5] However, as the court of appeals noted (Pet. App. 15a), a district court's determination that the government's explanation for delay is satisfactory is

[5]Because neither the district court judge nor the United States Attorney was able to remember the exact date of the oral sealing order, the court of appeals assumed, for purposes of petitioners' appeal, that the order to seal the tapes was given on May 20, the day the tapes were delivered to the Marshal's office, thus constituting a 39-day delay (Pet. App. 7a-8a). We agree that it was proper to conclude that the judicial sealing did not occur until the tapes were delivered to the Marshal's office in compliance with the order.

primarily factual, and should not be reversed unless clearly erroneous. *Campbell* v. *United States*, 373 U.S. 487, 493 (1963). Here, the electronic surveillance had produced more than 2,000 hours of recorded communications that had to be transcribed and used in the preparation of warrants and a lengthy indictment. The sealed boxes containing the original tapes were retained in the FBI office following the termination of the surveillance so that they would be readily available if the duplicate tapes were inadequate. Although the supervising agents had listened to portions of the duplicate original tapes at the conclusion of each day of surveillance, they did not then have time to listen to each call in its entirety (A. 181, 210). Moreover, as the court of appeals found (Pet. App. 16a):

> The fact that the agents listened to the duplicate original tapes does not mean that they might not have needed the originals later on in checking the transcriptions, or that the more detailed listening required later on in preparing transcripts might not turn up problems or malfunctions that were overlooked in the previous, more cursory listening at the end of each day. Furthermore, the district court found as a fact that there had been malfunctions in the past. The possibility of a reoccurrence is a good reason to keep the originals on hand.

The court's resolution of this primarily factual question is consistent with the manner in which other courts have applied the sealing requirement in cases involving relatively brief delays. In particular, delays to faciliate transcription have been consistently found acceptable. Thus, the Seventh Circuit has upheld delays of nine and 38 days in sealing to permit clarification of portions of duplicate tapes found to be inaudible during

transcription (*United States* v. *Angelini*, 565 F. 2d 469 (7th Cir. 1977), cert. denied, 435 U.S. 923 (1978)). The Fifth Circuit has upheld a five-week delay in sealing, during which time the tape recordings were transcribed (*United States* v. *Cohen*, 530 F. 2d 43 (5th Cir.), cert. denied, 429 U.S. 855 (1976)), and a 14-day delay where "[t]he government accounted for the delay by showing that the recordings remained in the FBI evidence room for seven days and that the additional seven days were used in the preparation of search warrants" (*United States* v. *Sklaroff*, 506 F. 2d 837, 840-841 (5th Cir.), cert. denied, 423 U.S. 874 (1975)).[6]

Petitioners claim (Pet. 10-12), however, that the interpretation given to the statute's sealing provision by the court below, and by other circuits, conflicts with that of the Second Circuit. In particular, they claim that whereas the Second Circuit excuses noncompliance with

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[6]In addition, the Second Circuit has upheld delays of seven to 13 days that were the result of shortages in both personnel and equipment (*United States* v. *Vazquez*, 605 F. 2d 1269 (2d Cir. 1979), cert. denied, No. 79-720 (Dec. 3, 1979)); a seven-day sealing delay that was primarily the result of the government attorney's preparations for trial (*United States* v. *Scafidi*, 564 F. 2d 633, 641 (2d Cir. 1977), cert. denied, 436 U.S. 903 (1978)); six and 13-day delays caused by efforts to have the issuing judge instead of another judge, seal the tapes (*United States* v. *Fury*, 554 F. 2d 522, 533 (2d Cir.), cert. denied, 433 U.S. 910 (1977); *United States* v. *Poeta*, 455 F. 2d 117 (2d Cir.), cert. denied, 406 U.S. 948 (1972)); and 24 and 42-day delays caused by efforts to ready the tapes for sealing and to duplicate the tapes, and by the unexpected hospitalization of the attorney in charge (*United States* v. *Caruso*, 415 F. Supp. 847, 850-851 (S.D.N.Y. 1976), aff'd, 553 F. 2d 94 (2d Cir. 1977)).

The interceptions involved in *Fury*, *Poeta*, *Caruso* and *Vazquez* were conducted pursuant to the sealing requirements of state statutes that do not differ materially from 18 U.S.C. 2518(8)(a). See *United States* v. *Fury*, *supra*, 554 F. 2d at 533; *United States* v. *Vazquez*, *supra*, 605 F. 2d at 1274 n.11; see also 18 U.S.C. 2516(2).

the statute's immediate sealing provision only upon a showing of a satisfactory explanation for the delay, the Third, Fourth, Fifth and Seventh Circuits, relying on Section 2518(10)(a), the general suppression provision of the statute, refuse to enforce the suppression sanction of Section 2518(8)(a) absent proof by the defendants of actual tampering.[7] But this case is not an appropriate one in which to resolve any difference among the circuits on the relation between these provisions.[8] Both courts

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[7]Section 2518(8)(a) provides that immediate judicial sealing or a satisfactory explanation for the absence thereof is a prerequisite to the use of the tapes. Section 2518(10)(a), however, provides for suppression of intercepted communications only if the communication was unlawfully intercepted, the order of authorization was insufficient on its face, or the interception was not made in conformity with the order of authorization. See *United States* v. *Chavez*, 416 U.S. 562 (1974); *United States* v. *Donovan*, 429 U.S. 413 (1977).

[8]In *United States* v. *Gigante*, 538 F. 2d 502, 506 (2d Cir. 1976), the Second Circuit criticized the Third Circuit's decision in *United States* v. *Falcone*, 505 F. 2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975), because it "focused primarily upon the suppression provisions of § 2518(10)(a), and paid scant attention to the independent prerequisites for admissibility delineated in § 2518(8)(a)." The court below (Pet. App. 8a-15a) indicated that it agreed with the prevailing approach that the two provisions must be read together. See cases cited *supra*, pages 7 and 8. Despite these differences in approach to the statute's sealing provision, we believe that petitioners' claim of inter-circuit conflict is exaggerated. The court of appeals (Pet. App. 18a-19a) properly distinguished *United States* v. *Gigante*, *supra*, in which the delays in sealing ranged from eight months to more than a year; the government offered "no explanation whatsoever" for the delays (538 F. 2d at 504); and "haphazard procedures" were followed in handling the tapes (*id.* at 505). There can be little doubt that, if confronted with similar circumstances, the panel that decided this case, like the court in *Gigante*, would have held that suppression was proper. Conversely, in light of the Second Circuit's decisions in *Vazquez*, *Scafidi*, *Fury* and *Poeta*, *supra*, it is not at all clear that the result in this case would have been different in the Second Circuit.

below found that the government's explanation for the delay was satisfactory. There was thus no violation of Section 2518(8)(a); accordingly, suppression is not required by that Section, and the applicability of Section 2518(10)(a) is not in issue. Where, as here, delays in sealing tape recordings of intercepted conversations are reasonable in purpose and relatively brief in duration, and the government has taken care to protect the integrity of the tapes,[9] the courts of appeals have uniformly held that suppression of the intercepted conversations is not warranted.[10]

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[9]Petitioners do not allege, and no evidence was presented to show, that the tapes were tampered with or altered in any way. Indeed, the record shows that the government was extremely careful to insure the integrity of the tapes. As one FBI agent testified (A. 227):

> As extra security on this, so that I could be satisfied today that no one had had access to that envelope once I sealed it, I insured that everyone of the envelopes that had an original tape and log inside had a piece of Scotch tape over at least one of my initials on the back of each envelope. The purpose of this was that if anyone would * * * attempt to get inside the envelope, not only would they tear the envelope, * * * they [would] break the seal where my initials were * * *.

Similar precautions were taken when the sealed envelopes were placed in sealed boxes on April 13, following the expiration of the intercept order (A. 233-234). Thus, the tapes were physically sealed at the end of each day of recording, well before the tapes were judicially sealed on May 20. Such precautions met all the safety requirements that accompany judicial sealing of tapes. See, *e.g.*, *United States* v. *Abraham*, 541 F. 2d 624, 628 (6th Cir. 1976).

[10]Relying on 28 U.S.C. 455, petitioners contend (Pet. 13-14) that the district court judge erred in refusing to recuse himself for purposes of the suppression hearing, since only he and the United States Attorney know when the oral sealing order was given, and the judge thus should have been available to testify concerning this disputed evidentiary matter. This claim is insubstantial. Petitioners cite no cases, and we are aware of none, which hold that a district judge must recuse himself in order to testify concerning an order given in his judicial capacity. It is well settled that what a judge learns in his judicial capacity is a proper basis for judicial observations, and cannot be the basis for disqualification. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *United States* v. *Patrick* 542 F. 2d 381, 390 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977); *United States* v. *Bernstein*, 533 F. 2d 775, 785 (2d Cir.), cert. denied, 429 U.S. 998 (1976). Moreover, the only question in issue was when the order to seal the tapes was given. The court of appeals resolved the issue most favorably to petitioners by assuming that the order was not given until the tapes were delivered to the Marshal's office. See *supra*, note 5.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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